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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1834

JOSEFA MUÑIZ, et al.,
Petitioners,

v.

SOUTH PUERTO RICO SUGAR CORP., et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Puerto Rico.

OPINIONS BELOW

The opinion of the Superior Court of Puerto Rico, unreported appendix in page 1a, was entered July 31, 1978 in case entitled Josefa Muñiz, Armando Rodríguez, et als v. South Puerto Rico Sugar Corporation, et als, Civil No. CS 77-1835; unpublished decision de-

nying review by the Supreme Court of Puerto Rico rendered September 28, 1978, case entitled Josefa Muñiz, et als v. South Puerto Rico Sugar Corporation, et als, 78-322 (Appendix at page 14a), unpublished decision to first reconsideration October 26, 1978 (Appendix at page 15a), unpublished decision to second reconsideration, November 16, 1978 (Appendix 16a), unpublished decision December 12, 1978, (Appendix at page 17a), unpublished decision deciding last motion of reconsideration January 10, 1979 (Appendix 18a).

JURISDICTION

The last motion for reconsideration was denied by the Supreme Court of Puerto Rico the 10th day of January, 1979 (Appendix at page 18a). An application for extension of time was granted on April 2, 1979, extending the time to file the petition to and including June 9, 1979, Josefa Muñiz, et al, v. South Puerto Rico Sugar Corporation, et al A-857.

The jurisdiction of this Court is invoked under 28 USC, Section 1258 (3).

QUESTIONS PRESENTED

1. Can a minor child be deprived of her property in a foreclosure procedure without following the prescribed process, depriving her of her property without due process and equal protection of the law?

2. Is it a violation of the due process and equal protection of the law to sell property in a judicial sale where the foreclosure of mortgage judgment had not been entered and four distinct parcels of land are sold

simultaneously in contravention to state law and for a price so grossly inadequate as to shock the judicial conscience

3. Is it violative of due process of law to render judgment upon a motion to dismiss without a hearing on the merits, when there are substantial uncontended facts including strong indications of fraud?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment of the United States Constitution, ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 6, 1964 judgment was handed down on civil action CD 64-51 in favor of South Puerto Rico Sugar Corporation against the defendants, the heirs of Armando Rodríguez Rodríguez and Josefa Muñiz, the deceased's wife as codebtor (Appendix at page 19a). Said judgment was rendered in default against all defendants, including a minor child, Betsy Maritza Rodríguez, without appointing her a prescribed tutor established in the Rules of Civil Procedure and was never entered (Appendix page 23a).

The judgment was rendered against two of the heirs who were at the time of the supposed service of process residents of New York City, but the person conducting the service of process declared that they resided in Yauco, Puerto Rico and that service had been completed there (Appendix page 23a). From the certificate of service the first irregularity comes into view

because said certificate of service was sworn and filed on May 22, 1964 and somehow the certificate was altered to attest that defendant Ely Rosalyn Rodríguez Muñiz was served process June 16, 1964.

Subsequently the four parcels of land were auctioned in January 18, 1965 for three thousand four hundred dollars (Appendix page 31a).

The debt claimed in the complaint was $658.25 and parcels of land foreclosed amounted to 206 cuerdas which is about 200 acres which at the time of the auction had a market value of about $2,000.00 an acre or about $400,000.00 for all the land sold. In 1968 the Federal Land Bank approved a loan to the buyer of $95,000.00 with the auctioned property guaranteeing the mortgage therein established. The sales price was $3,400.00 because lawyers fees and interests were collected in addition to the $658.25 indebtedness.

On March 10, 1977 the petitioners timely filed a complaint[1] for the recovery of the four parcels of land, arguing in synthesis that the default judgment on the foreclosure proceeding was null and void because the court had no jurisdiction over one of the defendants, now petitioner, named Ely Rosalyn Rodríguez Muñiz who could not have been served process because at that time she was resident of New York City. That the District Court at Yauco, Puerto Rico had no venue to a case in which real property was the base of the claim and that a minor child was a party against whom default judgment could not be rendered without the appointment of tutor ad litem as prescribed by the Rules of Civil Procedure.

[1] Article 1863 Civil Code of Puerto Rico, T.31, Section 5993 LPRA: "The cause of action to claim real property lapses in thirty years. . . ."

On March 22, 1977 co-defendant José Morales Caraballo filed a motion asking that the complaint against him be dismissed because he was mentioned in respect to rental of the land, a rental agreement that had already elapsed.

On April 25, 1977 co-defendant Violeta Barrera Martínez filed another motion to dismiss and co-defendant South Puerto Rico Sugar Corporation filed another motion.

On May 20, 1977 the petitioners filed an opposition to the motions filed by Violeta Barrera.

The 15th of June, 1977 the petitioners presented a motion in opposition to the motion to dismiss filed by South Puerto Rico Sugar Corporation and included a sworn statement by petitioner Josefa Muñiz in which she stated that her daughter, Ely Rosalyn Rodríguez, was in the mainland at the time of the supposed service of process.

All the motions were consolidated for discussion the 27th of June 1977 and attorneys for both parties presented their respective arguments and defendants could not controvert the contents of the sworn statement.

On July 28, 1978 after more than a year had elapsed, the Superior Court of Puerto Rico, Ponce Section rendered opinion and judgment notifying the same July 31, 1978. (Appendix page 1a).

A motion to reconsider was filed August 15, 1978 in which the constitutional issues were raised at the

Superior Court (Appendix page 27a). Said motion was denied the same day.

On August 30, 1978 a petition for a writ of revision was timely filed at the Supreme Court of Puerto Rico in which it was argued in synthesis that the Superior Court had erred in the following manner:

1. That the Superior Court had erred when dismissing the complaint while material facts remained in controversy; that to deny a hearing on the merits would deprive petitioners of their day in Court.
2. The Superior Court erred when it decided that from the record it could be deducted that the serving of process took place and that the contention that the Court did not have jurisdiction was inexistent.
3. The Superior Court erred when decided that the District Court where the foreclosure proceeding took place could render a default judgment against a minor child without the appearance of the ad litem tutor.
4. The Superior Court erred in deciding that the District Court had jurisdiction over the subject matter.
5. The Superior Court erred in sustaining the validity of a judgment that was reached at by violating the existing law and permitting that the petitioners' property be confiscated without due process of law and equal protection of the law.
6. The Superior Court erred upon deciding that the auction was valid.

On September 28, 1978 the Supreme Court of Puerto Rico denied review (Appendix page 14a). Reconsideration was timely filed and on October 26, 1978 denied (Appendix page 15a). Another reconsideration was filed and on November 16, 1978 the Supreme Court of Puerto Rico established that the appearance of the tutor was an unescapable requisite and gave defendants a term of fifteen (15) days to show cause for which a writ should not be issued (Appendix page 16a).

On December 12, 1978 the Supreme Court of Puerto Rico rendered a decision in which it reaffirmed the previous decisions denying the writ to review (Appendix 17a) and on January 10, 1979 the last motion to reconsider was denied, (Appendix page 18a).

REASONS FOR GRANTING THIS WRIT

There is no valid reason for the repeated denials to grant the writ to review sought by petitioners at the Supreme Court of Puerto Rico. The reasons stated in all the documents filed have a strong constitutional support and all the arguments sustained our position with clarity and with such vigor that we feel compelled to seek justice at this most high Tribunal.

The foreclosure procedure in which petitioners were deprived of their property was tainted with irregularities from beginning to end. The proper procedures were disregarded and set aside in a way that the result was a null and void process which deprived petitioners of their property without due process of law and without giving them the same treatment others would receive under like circumstances depriving them of property without equal protection of the law.

In the first place the judgment rendered at the District Court at Yauco, Puerto Rico (Appendix page 19a) was in default and the undisputed fact that defendant, Betsy Maritza Rodríguez was a minor made it obligatory for a tutor ad litem to appear on her behalf in order that said judgment could have been validly rendered.

Rule 45.2 (b) of the Puerto Rican Rules of Civil Procedure reads as follows:

> "(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary or recommend the matters to a master."[2]

[2] This rule is the same as Rule 55 B(2) of the Federal Rules of Civil Procedure with the exception that local Rule 45.2(b) does not afford for jury trial because civil actions are not conducted before a jury in this jurisdiction and provides for the matter to be recommended to a master.

The Supreme Court of Puerto Rico has interpreted this rule in *Fernández Martíñez* v. *Tribunal Superior,* 89 PPR, 737 and has adopted as an interpretative guideline Moore's Federal Practice Commentary on Federal Rule 55 B(2).[3]

Upon deciding our second motion to reconsider (Appendix page 16a) the Supreme Court of Puerto Rico accepted as dominant the doctrine established in *Fernandez* v. *Tribunal Superior (supra)* and said that the appearance of the tutor was an unescapable requisite, then unexplicably denied the writ in its next decision (Appendix page 17a).

The denial of the required tutor ad litem is a denial of due process of law because the established procedure was not followed. It has been said that due process must be understood to mean law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights (*Brown* v. *New Jersey*, 175 U.S., 172, 44 Led 119, 20 S Ct 77).

To disregard the rule violates the equal protection of the law because the minor child was not afforded the same right as guaranteed to all minors by the rule in this jursidiction. Equal protection and security

[3] Moore's Federal Practice, Volume 6, Section 55.05(4), 55-57: "Only the Court can enter a judgment by default against an infant or incompetent person, and then only when the infant or incompetent person is represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the infant or incompetent defendant is not represented by a general fiduciary who has appeared in the action, the court should appoint a guardian ad litem who should plead such a denial as to put the plaintiff to the proof of his case."

should be given to all under like circumstances. (*Traux* v. *Corrigan*, 257 U.S., 32, 66 Led 254, 42 S.Ct 124).

It was also a violation of due process of law and equal protection of the law to sell the four parcels of land in the same auction because the Code of Civil Procedure, Article 253, 32 L.P.R.A., Section 1134 establishes that "... When the sale is of real property, consisting of various parcels or known lots, they have to be sold separately..."

To violate said express mandate deprives petitioners of the protection granted by the statute, especially in a situation as the one before us where the claim was for $658.25, plus $2,700.00 for lawyers fees and costs an amount that could have been met easily with the sale of the smallest of the parcels. As a matter of fact a single acre could have surpassed the amount of the claim.

The amount for which the four parcels of land were sold ($3,400.00) for a property whose market value was approximately $400,000.00 is so inadequate as to shock the judicial conscience the disparity between the sale price and the market value is often said to give rise to a presumption of fraud. (*Graffan* v. *Burgess*, 117 U.S. 180, 20 Led 838.

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice. *Kinsella* v. *United States*, 361 U.S., 234, 4 Led 2d, 268, 80 S Ct, 297.

It is important to point out that when the price is so grossly inadequate, the sale should be set aside, especially where the interests of minors are involved. *Johnson* v. *Avery*, 60 Minn 262, 62 NW, 283.

Furthermore, it is relevant to bring forth the fact that the judgment had not been entered (Appendix 23a) so it was never final and executory in which case there was no valid authority for the auction which in turn made the preceeding sale null and void. Rule 46 of the Rules of the Puerto Rican Rules of Civil Procedure provides: "... the notation of a judgment in the civil docket constitutes the entering of the judgment; and the same shall not be effective before that entry". The sale of property under an unvalid execution confers no title. *LaMaster* v. *Keeler*, 123 U.S., 376, 8 S Ct, 197, 31 LED 238.

It was premature for the Trial Court, the Superior Court of Puerto Rico, to decide the case upon a motion to dismiss when there remained uncontended facts undecided, many of which had strong connotations of fraud.

For example, the person who served process stated in the altered certificate of service that the summons were served to Ely Rosalyn Rodríguez Muñiz on June 16, 1964 (Appendix page 25a). The same person rendered a sworn statement (Appendix page 34a), saying that the summons were served on that same party the 19th of June, 1964 which contradicts his own statement. There was evidence in the record that confirmed said contradiction. Being one of the principal allegations of plaintiffs, now Petitioners, the fact that process had not been served, it was highly questionable that the case could have been fairly decided without a confrontation with such a witness and without giving the plaintiffs their opportunity to present evidence. Due process implies the right to contradict by proof every material fact which bears on the question

of right involved (*Green* v. *McEroy*, 360 U.S. 474, 3 L ed 2d, 13, 77, 79 S Ct 1400).

There are constitutional limitations upon the power of courts even in aid of their own valid process to dismiss action without affording a party an opportunity for a hearing on the merits of his cause (*Societe Internationale Pour Participations Industrielles et Comerciales, S. A.* v. *Rogers*, 1958, 357 U.S., 197, 2 L ed 2d 1255, 78 S CT 1087).

The unfairness of a denial of a full hearing was more patent when the hearing claimed could have proven that necessary parties had never received notice of the case, that which in itself is a grave violation of due process of law.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of the pending of the action and afford them an opportunity to present their objections. (*Robinson* v. *Hanrahan*, 409 U.S., 38 34 L ed 2d 47, 93 S Ct 30).

The formality and procedural requisites for a due process hearing should have been observed, especially, where there are strong indications of fraud in the service of process and the disparity of the price and the value of land acquired at the judicial sale are so great.

We firmly believe that this honorable Court shall grant the petition solicited so that a firm doctrine can be established that will prevent situations like the one presented from occurring in the future, so that the weak, the ignorant, the incompetents, minors and

all those that lack the necessary resources, will not be deprived of their rights without be1ng heard and properly defended. It is indispensable that when the head of the family, who is the guardian of the financial security of his subsequent heirs, is deceased, and the mother does not have in fact the necessary capacity to administer the estate, that a firm doctrine exists to safeguard all the rights involved so that no unjust or improper advantages can be taken by anyone and that the courts of justice should act as guardians to protect the weak and to assist the ignorant and watch for a sound administration of justice so that the people do not loose faith in our democratic system of government.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision and judgment of the Supreme Court of Puerto Rico.

Respectfully submitted,

JUAN LUIS BOSCIO-MONLLOR
P. O. Box 708
Ponce, Puerto Rico 00732

Counsel for Petitioners

APPENDIX

To the Honorable Supreme
Court of the United States

On April 2, 1979 the Court conceded us an extension of time until June 9, 1979 to obtain the necessary translations to complete this appendix because the Supreme Court of Puerto Rico had a shortage of personnel and could not provide the required translation on time and we were authorized to hire a private translator to proceed with the translations that then would be certified by the Supreme Court of Puerto Rico.

We hired Mr. Thomas Rice, who is a professional trained translator-interpreter, certified by the U. S. Department of State, the U. S. Civil Service Commission and the United Nations (PASB), who submitted the translations to the Supreme Court of Puerto Rico, which informed us that certifications could only be provided by the end of June.

We called the Clerk's Office of this Court and was instructed to file the petition with the available translations with this commentary.

Respectfully,

JUAN LUIS BOSCIO-MONLLOR

IN THE
SUPERIOR COURT OF PUERTO RICO
PONCE SECTION

CIVIL NO. CS 77-1835

UNITED STATES OF AMERICA
THE PRESIDENT OF THE THE U.S.A.

JOSEFA MUÑIZ, etc.,

Plaintiff,

v.

SOUTH P. R. SUGAR CORP;
VIOLETA BARRERA, etc.

Defendant.

Concerning: Replevying Action, Nullity Of Judgment, Auction And Purchase And Sale

NOTIFICATION OF JUDGMENT
BY ORDINARY MAIL

TO *Juan L. Boscio, P. O. Box 708, Ponce, Puerto Rico.*

Attorney Carlos García Méndez, Box 193, Mayaguez, P. R. 00708

Attorney Toro Cubergé, Box 66, Yauco, P. R. 00768

THE SECRETARY that subscribes notifies you that this Court has handed down a judgment in subject case with the date of *28 July, 1978,* which has been duly registered and filed in the records of this matter, where you can find out in detail the terms of same.

AND, you being or representing the party injured by the judgment from which a remedy of appeal may be established, I address you this notification, having filed in

the records of this case copy of same with the date 31 July, 1978.

Ponce, P. R. on 31 July 1978

RAFAEL COLON PEREZ
Secretary

By: R. Droz

Asst. Secretary

IN THE
SUPERIOR COURT OF PUERTO RICO
PONCE SECTION

Civil No. CS 77-1835

JOSEFA MUÑIZ, ARMANDO RODRIGUEZ RODRIGUEZ et als.

Plaintiffs

v.

SOUTH P. R. SUGAR CORP; VIOLETA BARRERA MARTINEZ; FEDERAL LAND BANK OF BALTIMORE; JOSE MORALES CARABALLO,

Defendants

Concerning: Action For Recovery Reversal Of Judgment Auction And Sale

OPINION AND JUDGMENT

On 21 April, 1964, the defendant, South Puerto Rico Sugar Corp, filed a complaint in the District Court of Puerto Rico, Yauco, Court, alleging that, on the mortgage debt on four pieces of property belonging to the defendants, there was one installment due.

In the same complaint, it was informed that one of the members of the Succession of Armando Rodríguez was the minor Betsy Maritza Rodríguez Muñiz.

On 6 November, 1964, the District Court at Yauco, in case CD 64-51 pronounced a judgment by default arranging that once the judgment is final that a writ of execution be issued to the marshal of this court, so that he can put up for public auction the mortgaged properties and which are described in the complaint . . ."

On 18 January, 1965, an auction certificate was issued awarding the properties to Miss Violeta Barrera for the amount of $3,400.40.

On 26 January, 1965, and before the Notary Public Luis López Victoria, deed number 13 was executed on a judicial sale, by Mr. Teobaldo González, Marshal of the District Court at Yauco and Mrs. Violeta Barrera, as purchaser.

On 26 June 1967, Violeta Barrera, appeared before the Court, represented by her attorney, requesting the cancellation of the lien annotations in the Property Registry made prior to the date of the registration of the mortgage that was executed. On that same day the court issues an order granting what was requested.

On 10 October 1968 a brief is presented in which it is requested that the court decree a reversal of the judgment pronounced in the case on 6 November, 1964, as well as the result of same.

On 26 July, 1977, file number TD 64-51, was received at the secretary's office of this Court, as a transfer.

On 10 March, 1977, complaint is filed for Action for Recovery, Reversal of Judgment, Auction and Sale, pointing out, basically, the same errors in the brief of 10 October 1968. On 23 March, 1977, the first motion for dismissal is filed in which it is alleged.

> "That in subject complaint and with respect to the appearing co-defendant he is mentioned only in allegation number ten (10) to the effect that he." ... appears in the property registry San Germán Section with a five (5) year lease dated thirty (30) August of nineteen hundred seventy-three (1973) on said properties," not citing essential facts for a cause of action against the appearing co-defendant.
>
> The complaint in this case does not expose a claim which authorizes the granting of a remedy against Mr. JOSE MORALES CARABALLO."

On 29 April, 1977 a second motion for dismissal of the complaint is filed in which it is alleged, in essence:

1) lack of jurisdiction of this court over the appearing party [32.L.P.R.A. Ap II R 10.2 (2)] . . .being the appearing party a third mortgagee which acquired through public auction and registered in his name the properties.

2) The complaint should be dismissed due to the appearing party having acquired the properties referred to in subject complaint by ordinary adverse and extinctive possession of ownership, for 10 years, in good faith and just title.

3) the subject complaint is barred by statute of limitations, since the plaintiffs in the present action have let some 12 years go by. Art. 1253 P. R. Civil Code 1931. (31 L.P.R.A. sec 3512)"

On 24 May, 1977 the party of the plaintiff appears opposing what has been expounded by the party of the defendant upholding that:

1) "The judgment becomes null and void ab initio, because there being a minor involved in the succession, and being in default, the Superior Court at Ponce was obliged to appoint a defense counsel for the minor.

2) That the judgment also became null and void as the District Court at Yauco lacked jurisdiction, in an action concerning real estate, such jurisdiction corresponding to the Superior Court at Ponce.

3) That the acquisition of said properties by the defendant was null and void for not having complied with section 1134 of title 32 L.P.R.A. of calling for said auction by separate properties."

The first error raised by the party of the defendant was not committed. According to what is evident in the record of the case the co-defendants, Violeta Barreras Martínez and South P. R. Sugar Corp., were duly summoned. We do not find in any page of the memorandum presented by the defendant that the second part of the error is discussed, concerning the relation between the lack of jurisdiction and the allegation of being a third party, and after a thor-

ough search, we have not been able to find anything that throws light on this matter.

The third error noted by the defendant is to the effect of applying article 1235 of the P. R. Civil Code, ed 1931 on the statute of limitations, for not having filed the action on the reversal of the judgment during the four years established by said article.

The defendant is not aided by reason. Article 1253 (supra) states:

> "The action of nullity will last only 4 years. This period will start to run: In the cases of intimidation or violence, from the day that these would have ceased; In those of error, or fraud, or falsehood of the cause, from the consummation of the contract; When the action is directed to invalidate contracts made by a married woman, without competent authorization or license, from the day of the dissolution of the marriage; And when it refers to the contracts entered into by minors or those incapacitated, from the time they leave their tutelage." Civil Code, 1930, art. 1253.

This article corresponds to subtitle 4. Part II, chapter 263 referring to the Nullity of the Contracts the defendant points out.

> "Graham vs Crosas, 10 D.P.R. 194
>
> If an awarding in a foreclosure of a mortgage procedure is not null and void, even though it is annullable, it is a contract and the action to request the nullity of same prescribes after four (4) years in accordance with this section.
>
> *Mestre vs. Michelena*, 30 D.P.R. 148
> *Zayas vs Orraca*, 80 D. P. R. 350
>
> The fraud already existed, the improper influence as it is indicated in common law, that influence being one of the various ways of fraud in Civil Law, the contract invalidated by one or the other, would not be inexistent but annullable and the action to claim its nullity would prescribe four years after the consummation of same."

In Mestre v. Michelena (supra) the following difference was established:

> "The sale takes place in a mortgage procedure or is an act of the debtor, or the superior authority of the State. The awarding or the deed that is made on selling the property is a contract between the original debtor and the purchaser, or between the State and the purchaser. The court having jurisdiction on the matter, object of the action and on the parties, any defect in the granting of the contract would make it annullable, but not absolutely null and void.
>
> We are inclined to agree with the appellants that if the San Germán Court did not acquire jurisdiction on the debtors, the sale made was entirely null and void and that something that is completely null and void cannot be validated by subsequent acts."

In *Monrozeau* v. *Amador* 40 D.P.R. 132, 138 (1929) the court stated:

> The action of nullity which is referred to by article 1268 of the Civil Code is one to invalidate annullable contracts. The period of four years therein prescribed does not prevent action for recovery of real estate whose possession has been lost by means of a null and void judicial process. *Rodríguez Soler* v. *Alonso*, 37 D.P.R. 344; *Solá* v. *Castro* 32 D.P.R. 804; *Oliver* v. *Oliver*, 23 D.P.R. 181; *López* v. *Quiñones*, 30 D.P.R. 342."

In this specific situation, it is not in order to proceed to apply Article 1253 (article 1268 of 1902 is 1253 of 1931).

It appears from the records that the supposed nullity which the plaintiff upholds in his exposition on the lack of jurisdiction of the court for not having carried out certain summonses, is inexistent. Both from the records of the original case as from those of the present one, it clearly appears that those summonses were carried out.

The Court was not obliged to appoint a legal counsel to the minor involved in the Succession. The minor had her mother representing her which had the patria potestas.

In *Agostini* v. *Registrador,* 39 D.P.R. 577 579 (1929) the Supreme Court stated:

> In our law tutelage arises when the patria potestas does not exist. The parents are the legitimate representatives of their children. When these are represented by a tutor or by a counsel it is because the parents do not exist or they are disabled. In the case we studied, the father was alive, he was in full exercise of his patria potestas over his minor children and there existed no incompatibility between the interests of one or the others.
>
> The mother could represent the minor since she was not impeded in assuming her representation.

In *Mallen* v. *Vidal* 25 D.P.R. 669, 671 (1917) the Supreme Court states:

> Since the right to the patria potestas is naturally inherent to both parents, it cannot be supposed that the legislature, in 1907, was going to abolish the fundamental right of the mother so that it would only come forth in cases of death, incapacity or absence of the father. True as it is as has been stated by the appellant, in citing Sanchez Roman, (Vol. II. Tome V, Pag. 1103), that the patria potestas is more of a natural function than a right, but in addition a juridical relationship necessarily exists, as has been shown by the very nature of this litigation. The patria potestas is a juridical institution.

In Biaggi v. Corte 68 D.P.R. 407, 409, the Supreme Court states:

> It is only when the interests of the minor and of his parent come to be in conflict, or if the court deems it convenient that the minor is represented by his general tutor or a legal counsel. *Cibes et al.* v. *Santos et. al,* 22, D.P.R. 224; *Agostini* v. *Registrador,* 39 D.P.R. 577; see *Díaz Bermúdez et al.* v. Succession of *Díaz Roman et al.* "68 D.P.R. 249 (1948)

The statement of the plaintiff on the lack of jurisdiction

of the Court of the first contrary is to the law and what was determined in *Rodríguez* v. *Registrador,* 75 D.P.R. 712 (1953) and *O. Pares* v. *Galan,* 98 D.P.R. 772 (1970)

The Code of Civil Procedure, in its Article 75; (32 L.P.R.A. sec. 401) provides for:

> "The lawsuits which are followed for the following causes in which the object of the action, or part of same, is filed, without detriment to the authority of the court to change the place of the hearing, according to what is provided for in this Code:
>
> 1. To recover the possession of real estate or of a property or interest in same, or to determine damages caused to real estate.
> 2. For the partition of real estate.
> 3. For the foreclosure of a real estate mortgage. If the property is located partly in one district and partly in another, the plaintiff may choose any of the two and the district thus chosen will be the proper one for the hearing of said matter."

In *O. Parés Inc.* v. *Galán* (supra) the Supreme Court Stated:

> "The agreement of the parties so that the case is heard in an inappropriate courtroom can be expressed expressedly or tacitly. The conformity of one party is manifested with its conduct or inaction in not opposing, having the opportunity to do so, the case continuing being heard in a courtroom which is not the appropriate one. The non-appearance or contempt of court of one party, after having been summoned, should be considered as the agreement or the conformity of said party of the case continuing to be heard in the courtroom where it was filed. *Rodríguez* v. *Registrador,* 75 D.P.R. 712 (1953)

In *Aetna Ins. Co.* v. *Superior Court* 103 D.P.R. 480 (1975) the Supreme Court promulgates:

> "Rule 3 of the Civil Procedure following the pre-

cepts of Sec. 10 of the law of the Court, 4 L.P.R.A. sec. 62, provides that all lawsuits will be presented in that courtroom of the court located in the territory in which it would have been filed uner the previous legislation prior to the Law of the Court ... This notwithstanding, the same Rule 3 of the Civil Procedure and Sec. 10 of the Law of the Court permits the discussion of such lawsuits in the courtroom in which they are presented in providing that:

"... no case will be dismissed based on having submitted same to a section without jurisdiction or authority or to a courtroom of a court without jurisdiction on the matter. Every case can be discussed in the section or courtroom in which it is filed by agreement of the parties and the consent of the judge which presides said courtroom at that time, or, if it is not thus heard, it will be transferred by order of the judge to the corresponding section or courtroom in conformity with the Rules that the Supreme Court adopts."

In harmony with Rule 3 previously transcribed, the judge of the courtroom in which the lawsuit is filed should determine if the agreement which the rule refers to on the part of the parties exists and if he should give his consent so that the case continues to be heard in said courtroom.

If well one of the fundamental purposes of the judicial reform embodied in the Constitution, in the Law of the Court and then in the Rules of the Civil Procedure of 1958 was the achievement of the unification of the courts and the elimination of the jurisdictional defects and the inexorable fatal effects of a mistake regarding the appropriate place to discuss a litigation, said objective must be achieved not only through the unification of the courts for the purposes of jurisdiction but by achieving the most orderly organization of our courts for the purposes of functioning. We have demonstrated our concern in that sense in the cases of *Colón* v. *Superior Court* 97 D.P.R. 106, 122 (1969) and *Builders Ins. Co.* v. *Superior Court*, 100 D.P.R. 401 (1972), since the excessive laxity in the authorization of hearing the cases outside of the place which the law establishes could contain a pernicious germ

that would undermine the confidence and the respect of our citizenry towards our system of justice.

Rule 3 requires the union of three wills for the hearing of a case in a courtroom that even though it has jurisdiction, it is not the one determined by law for the purposes of competence. It is therefore necessary that both the judge and the parties consent to it. The consent of the judge constitutes a new element added by the Law of the Court. Given the result which we will reach further on it is not necessary to determine the circumstances which should be present in order for the judge to give his consent to continue the procedures of the lawsuit in his courtroom.

The agreement of the parties can be precise or tacit, *Rodríguez* v. *Registrador* 75 D.P.R. 712 (1953), and can be manifested by the party of the plaintiff by an affirmative conduct and sufficient demonstration of its purpose to accept said courtroom or a clear abandonment due to inaction of its right to the transfer. *Longoria* v. *Superior Court* 102 D.P.R. 267 (1974); *O. Parés, Inc.* v. *Galán*, 98 D.P.R. 780 (1970); *Rivera Esbri* v. *Archevald*, 83 D.P.R. 604(1961); *Rodríguez* v. *Registrador*, supra, pag. 735.

A defendant should raise the question by means of an opportune motion to transfer and actively seek the remission of the cause to the section or courtroom to which it corresponds according to the case, if it wants to avoid his conformity being imputed to the case being handled in a courtroom where it was filed. It is not sufficient to allege in its reply as a special plea the lack of competence of the court in which it was filed but it is necessary to actively negotiate the transfer to the courtroom where it corresponds. *Rivera Esbri* v. *Archevald*, supra. pag. 610. In the past we have protected a diligent litigant in his right to have the case heard in the proper court by means of the issuance a writ of inhibition. *Rivera Esbri* v. *Archevald* supra; *Fernández* v. *District Court*, 76 D.P.R. 364 (1954).

Prior to the Rules of the Civil Procedure of 1958 there was no need to determine what steps or proce-

dures on the part of the parties in a court without competence constituted their consent for the hearing of the case before said court. This was so because Article 77 of the Code of Civil Procedure repealed by the Rules of Civil Procedure of 1958, established which acts on the part of the parties constituted a submission to the court. . . ."

The last statement of the plaintiff is to point out that the acquisition of the properties made by the defendant was null and inexistent for not having complied with article 253 of the Code of Civil Procedure, ed. 1933, (32 L.P.R.A. sec. 1134) which provides for:

> "The sale of goods in carrying out an order for attachment, should be made by means of an auction to the best bidder, and will take place between nine in the morning to five in the afternoon. Once enough goods would have been sold to comply with the attachment order, no more can be sold. Nor the officer that complies with the order nor his representative can be purchasers, nor have an interest in any purchase in said auction. When the sale involves personal property, capable of being hand delivered, it should be in view of the bidders, and should be sold in lots which have probabilities of achieving the highest prices; and when the sale involves real estate consisting in various known plots or lots, they should be sold separately or if any portion of said real estate were to be claimed by a third person, and said person demand that said portion be sold separately, it should be sold in the manner demanded. If the debtor so declared in the judgment were to be present, he can determine the order to follow in the sale of real estate or personal property when it is is made up of various known plots or lots, or of objects which can be sold separately advantageously, and the marshal should adhere to his instructions."

It arises from the file that the Marshal limited himself to the instructions which were given him by the court. The properties were at all time separately identified and none

of the plaintiffs demanded that their portion be sold separately. There is nothing in the procedure that would taint it with nullity and in the supposition that it could be annullable, the action would be prescribed upon applying article 1253 of the Civil Code.

With respect to the statement on "ordinary and acquisitive prescription of extensive domain, for 10 years in good faith and just title," since it is not necessary for the fair solution in this lawsuit we will not enter into the merits of same.

Grounded upon all which has been previously stated the dismissal of subject case is hereby decreed.

Register and notify.

Given at Ponce, Puerto Rico, on 28 July 1978.

QUINTIN MORALES RAMIEZ
Superior Judge

AT THE
SUPREME COURT OF PUERTO RICO

No. R-78-322

JOSEFA MUÑIZ and The Succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow, Josefa Muniz and her children, Aurea, Esther, José Ramón, and Epifania Rodríguez Sánchez, Armando Rodríguez Semidey; Eli Rosalyn and Betsy Maritza of the surnames Rodríguez Muñiz.

Plaintiffs and appellants

v.

SOUTH PUERTO RICO SUGAR CORPORATION and others

Defendants and appealed

Revision

DECISION

San Juan, Puerto Rico, on 28 September, 1978

As to the previous request for revision the petition is denied certified by the Secretary. The Chief Justice Mr. Trías Monge and the Associate Justices, Messrs Martín and Díaz Cruz did not intervene.

ERNESTO L. CHIESA
Secretary

AT THE
SUPREME COURT OF PUERTO RICO

No. R-78-322

JOSEFA MUÑIZ and the succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow, Josefa Muniz and her children Aurea, Esther, José Ramón and Epifania Rodríguez Sánchez, Armando Rodríguez Semidey; Eli Rosalyn and Betsy Maritza, of the surnames Rodríguez Muñiz.

Plaintiffs and appellants

v.

SOUTH PUERTO RICO SUGAR CORPORATION and others

Defendants and appealed

Revision

DECISION

San Juan, Puerto Rico on 26 October, 1978

As to the motion for reconsideration, the petition is denied.

It was resolved by the Court and it is certified by the Secretary. The Chief Justice Mr. Trías Monge and the Associate Justices, Messrs. Torres Rigual, Martín and Díaz Cruz did not intervene.

ERNESTO L. CHIESA
Secretary

AT THE
SUPREME COURT OF PUERTO RICO

No. R-78-322

JOSEFA MUÑIZ and the Succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow, Josefa Muñiz and her children Aurea, Esther, José Ramón, and Epifania Rodríguez Sánchez; Armando Rodríguez Semiday, Eli Rosalyn and Betsy Maritza of the surnames Rodríguez Muñiz.

Plaintiffs and appellants

v.

SOUTH PUERTO RICO SUGAR CORPORATION and others

Defendants and appealed

Revision

DECISION

San Juan, Puerto Rico on 16 November, 1978

Having reexamined again the merits of the revision filed, in the light of the second motion for reconsideration, the Court grants the defendants and appealed a term of fifteen (15) days so that they can appear in writing to show cause, if any, for which a limited writ should not be issued modifying the sentence handed down by the Superior Court at Ponce, on 28 July, 1978, to the effect that the co-plaintiff Betsy Maritza Rodríguez Muñiz a minor at the date which lawsuit TD-64-51 was processed by default before the District Court at Yauco, this being on the grounds that the minor at that time, Betsy M. Rodríguez Muñiz, never appeared assisted by her mother or defense counsel in said lawsuit; an unescapable requisite according to what is directed in the Civil Procedure Rule 45.9 and

our pronouncement in *Fernández Martínez* v. *Superior Court*, 89 D.P.R. 754 (1964).

It was resolved by the Court and it is certified by the Secretary. The Chief Justice Mr. Trías Monge and the Associate Justices Messrs. Martín and Díaz Cruz did not intervene.

ERNESTO L. CHIESA
Secretary

AT THE
SUPREME COURT OF PUERTO RICO

No. R-78-322

JOSEFA MUÑIZ and the succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow Josefa Muñiz, and her children Aurea, Esther, José Ramón, and Epifania Rodríguez Sánchez; Armando Rodríguez Semidey, Eli Rosalyn and Betsy Maritza of the surnames Rodríguez Muñiz.

Plaintiffs and appellants

v.

SOUTH PUERTO RICO SUGAR CORPORATION and others

Defendants and appealed

Revision

DECISION

San Juan, Puerto Rico on 12 December, 1978

Having examined again the arguments adduced by the parties in regard to the merits of the appeal, the motions for reconsideration presented and the appearances to our

Decisions, it is decided to deny the last requested reconsideration.

It was resolved by the Court and it is certified by the Secretary. The Chief Justice Mr. Trías Monge and the Associate Justices Messrs. Martín, Díaz Cruz and Irizarry Yunqué did not intervene.

ERNESTO L. CHIESA
Secretary

AT THE
SUPREME COURT OF PUERTO RICO

No. R-78-322

JOSEFA MUÑIZ, etc., et als

Plaintiffs and appellants

v.

SOUTH PUERTO RICO SUGAR CORPD. and others

Defendants and appealed

Revision

DECISION

San Juan, Puerto Rico, on 10 January, 1979.

As to the motion for reconsideration from the party of the appellants, the petition is denied.

It was resolved by the Court and it is certified by the Secretary. The Chief Justice Mr. Trías Monge and the Associate Justices, Messrs. Martín, Díaz Cruz and Irizarry Yunqué did not intervene.

ERNESTO L. CHIESA
Secretary

IN THE
DISTRICT COURT OF PUERTO RICO
YAUCO SECTION

Civil Number
CD 64-51

SOUTH PUERTO RICO SUGAR CORP.,

Plaintiff

v.

JOSEFA MUÑIZ, and the succession of ARMANDO RODRIGUEZ RODRIGUEZ, composed of his widow, the previously named Josefa Muñiz, and his children: Aurea Esther, José Ramón, and Epifania of the surnames Rodríguez Rivera, Armando Rodríguez Semidey, and Eli Rosalyn and Betsy Maritza Rodríguez Muñiz, this last one a minor represented by her mother, the previously named Josefa Muñiz,

Defendants

Concerning Action On Real Estate Foreclosure Proceedings

JUDGMENT

In the present case the plaintiff South Puerto Rico Sugar Corp. started action on real estate foreclosure proceedings against the defendants named in subject case, which it alleged as follows:

That according to deed number 128 dated 24 October, 1958, before the notary Luis A. Negrón López, Mr. Armando Rodríguez Rodríguez and his wife Josefa Muñiz voluntarily established a mortgage in favor of the plaintiff South Puerto Rico Sugar Corp. to guarantee a financing loan of $18,000.00 that with interests at 6% annually would be satisfied in eight installments, that is $2,250.00

of the capital plus total interests earned up to the day of 30 June of the years 1959 to 1966, including making the mortgage extensive to the stipulated annual interests of 6%, to interest for delay at the same rate and up to the amount of $1,080.00, and to a credit of $2,700.00 for court costs and lawyer's fee of the creditor in case of a judicial claim, and the mortgage being on four rural properties that are described in the claim with the letters A, B, C and D, located in the wards Vegas and Naranjo of the municipality of Yauco, P. R.; that of the mortgage debt, the installments due on 30 June of the years 1969, 1960, 1961 and 1962 were paid; that the installments which became due on 30 June 1963, amounting to $2,250.00 of capital and interests, was not paid in its totality; the amount of $658.25 still pending payment according to the settlement as of the first day of January 1964, and that this amount of $658.25 notwithstanding that it was due and notwithstanding the steps taken by the creditor, has not been satisfied nor totally nor in part by the defendants. The action is directed, therefore, towards the collection of said amount of $658.25 of the installment due and not paid plus its interests up to 20 April 1964 that is the date of the claim, in other words the total amount of $670.25 plus the amount of $2,700.00 which was agreed and guaranteed by the mortgage for court costs and lawyer's fees of the creditor in case of a judicial claim, as well as the interests on the amount of $670.25 which are earned at 6% annually from 20 April, 1964 and until the total payment.

It is also alleged in the claim that the debtor, Armando Rodríguez Rodríguez passed away on 30 September, 1961 and that by a judgment dated 26 January, 1962, in civil case CS 62-47, the Superior Court at Ponce, declared as sole heirs his children and widow, which are all the defendants named in subject case.

It is requested by the plaintiff that judgment be handed down in its favor and against the defendants, sentencing

them as heirs of the deceased debtor Armando Rodríguez Rodríguez, and also Josefa Muñiz as co-debtor, to satisfy in solidum the plaintiff South Puerto Rico Sugar Corp. with the amount of $670.25 the amount representing capital and interests up to 20 April, 1964, of the part of the mortgage installment due 30 June 1963, the interests on that amount at 6% annually from 20 April, 1964, and until total payment, plus the amount of $2,700.00 guaranteed by the mortgage for court costs and lawyer's fee of the creditor; and that it order to put up at public auction the properties mortgaged and that with the proceeds obtained that the creditor be paid the amount due it.

It is evident from the records that all the defendants were summoned personally in Puerto Rico, with the exception of the defendant Aurea Esther Rodríguez that with prior authorization from this Court was summoned personally at her home in the city of New York, State of New York, United States of America; and that having the time limit granted them expired, none of the defendants made any allegation whatsoever against the claim, nor requested an extension of time, for which at the request of the plaintiff the Secretary of the Court proceeded to record the nonappearance of all of the defendants.

On the day of 15 September, 1964, at the request of the plaintiff, a hearing was held in this Court, and in said day the plaintiff appeared represented by its attorney of record and documentary and attesting evidence was examined by means of which the Court verified to its complete satisfaction the certainty of the debt as well as the other allegations in the claim.

The claim and evidence having been seen, the Court dictates judgment allowing said claim and sentences the defendants Josefa Muñiz, Aurea Esther, José Ramón and Epifania of the surnames Rodríguez Rivera, Armando Rodríguez Semidey, Ali Rosalyn and Betsy Maritza of the

surnames Rodríguez Muñiz, the first one, by her own right and all as heirs and successors of the principal Armando Rodríguez Rodríguez, to satisy in solidum the plaintiff South Puerto Rico Sugar Corp. with the amount of $670.25 representing capital and interests up to 20 April, 1964, of the part of the installment of the mortgage debt due 30 June, 1963, and not paid, as well as the interests on said amount of 6% annually from 20 April, 1964 until total payment, and in addition the amount of $2,700.00 representing court costs and lawyer's fees of the creditor and which was specifically agreed to and guaranteed by the mortgage for such purposes.

Providing that once the judgment is final, a writ of execution be issued to the Marshal of this Court, so that he put up at public auction the mortgaged properties and which are described in the claim, said auction to be held in accordance with what the law provides, and with the proceeds obtained the creditor-plaintiff be paid the total amount due it according to what is provided for in this judgment.

Yauco, Puerto Rico, on 6 November, 1964.

/s/ FERNANDO MARTINEZ PACHECO
Judge, District Court
Yauco Court

NOTIFICATION

Josefa Muñiz, widow, Rodríguez, by herself and as mother of the minor Betsy Maritza Rodríguez, Betsy Maritza Rodríguez, Eli Rosalyn Rodríguez,	#4 San Rafael Street (2nd Floor) Yauco, Puerto Rico
Jose Ramón Rodríguez and Epifania Rodríguez	#314 25 of July St. Yauco, Puerto Rico
Armando Rodríguez	Filtration Plant, Peñuelas, P. R.
Aurea Esther Rodríguez	630 E. 138 St., Bronx 54, N.Y.

You are hereby notified of the judgment handed down by this Honorable Court in subject case, which I notify to all of you for all legal effects that proceed.

At Yauco, Puerto Rico on 6 November, 1964.

Fernando Martínez Pacheco
Sec. District Court
Yauco Court

I CERTIFY: That I have notified Attorney Carlos García Méndez attorney for the party of the plaintiff, to his postal address, Box 173, San Germán, P. R. forwarding him exact and faithful copy of the proceeding judgment.

Yauco, Puerto Rico, on 6 November, 1964.

Fernando Martínez Pacheco
Sec. District Court
Yauco Court

(SUPERIOR COURT OF PONCE
SEAL AFFIXED)

IN THE
DISTRICT COURT OF PUERTO RICO
YAUCO COURT

Civil Number
CD-64 51

THE UNITED STATES OF AMERICA)
The President of the U.S.A.)SS

SOUTH PUERTO RICO SUGAR CORP.

Plaintiff

v.

JOSEFA MUÑIZ; and the succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow, the previously named Josefa Muñiz, and his children Aurea Esther, José Ramón and Epifania of the surnames Rodríguez Rivera, Armando Rodríguez Semidei, and Eli Rosalyn and Betsy Maritza of the surnames Rodríguez Muñiz, this last one a minor represented by her mother, the previously named Josefa Muñiz,

Defendants

Action Concerning Real Estate Foreclosure Proceedings

SUMMONS

The People of Puerto Rico,

To the defendants: Josefa Muñiz as herself and as a mother with patria potestas over her youngest daughter Betsy Maritza Rodríguez Muñiz; Aurea Esther Rodríguez Rivera; José Ramón Rodríguez Rivera; Epifania Rodríguez Rivera; Armando Rodríguez Semidei; Eli Rosalyn Rodríguez Muniz, and Betsy Martiza Rodríquez Muñiz who is a minor and is represented by her mother Josefa Muñiz;

BY THESE PRESENTS you are hereby summoned and are required to notify Attorney Carlos García Méndez, the

attorney for the plaintiff, whose address is: Box 173, San Germán, P. R. with copy of your answer to the complaint, copy of which is served in this action, within ten days after having been served with this summons, if the notification is made in Puerto Rico, and within forty days if the notifications is made outside of Puerto Rico, excluding the day of the serving of the summons.

If you fail to do this, a sentence will be handed down against you by default, granting the remedy requested in the complaint.

Issued under my signature and seal of the Court, at Yauco, P. R. today, the 5th of May, 1964.

(Signed) Illegible
Sec. of the District Court of
P.R. Yauco Court

By: Assistant Secretary

(SEAL AFFIXED)

Exhibit 15
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CERTICATE OF SERVICE OF SUMMONS

I, TOMAS COLLADO, Assistant Marshal of the District Court of Puerto Rico, Yauco Section, CERTIFY:

That on request of lawyer Carlos García Méndez, counsel for plaintiff, I proceeded to serve these summons, notifying personally defendant Josefa Muñiz in her own right and also as mother in patria potestas of defendant minor Betsy Maritza Rodríguez Muñiz on 22 of May, 1964, to defendant Eli Rosalyn Rodríguez Muñiz, on 16 of June 1964, to defendant minor Betsy Maritza Rodríguez Muñiz

on 22 of May 1964, to defendant José Ramón Rodríguez Rivera on 22 of May 1964, and to defendant Epifania Rodríguez Rivera on 22 of May, 1964, all of them in this city of Yauco, Puerto Rico; by handling to each of said defendants, on the above stated date, a true and exact copy of the complaint mentioned in said summons, writing on the back of the copy of said summons which was served to each defendant, under my signature, the place and date of the notification.

Yauco, P. R., 22 May 1964.

(Sgd.) Tomas Collado
Marshal, District Court
Yauco Section

EXHIBIT 15
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AT THE
SUPERIOR COURT OF PUERTO RICO
PONCE COURT

Civil No. CS-77-1835

JOSEFA MUÑIZ and the Succession of ARMANDO RODRIGUEZ RODRIGUEZ, composed of his widow Josefa Muñiz, his children Aurea, Esther, José Ramón and Epifania Rodríguez Sanchez Sanchez; Armando Rodríguez Semidey; Eli Rosalyn and Betsy Martiza of the surnames Rodríguez Muñiz,

Plaintiffs

v.

SOUTH PUERTO RICO SUGAR CORPORATION; VIOLETA BARRERA MARTINEZ, FEDERAL LAND BANK OF BALTIMORE; JOSE MORALES CARABALLO,

Defendants

Concerning: Replevying Action, Nullity Of Judgment, Auction And Purchase And Sale

MOTION FOR RECONSIDERATION OF JUDEMENT

TO THE HONORABLE JUDGE QUINTIN MORALES RAMIREZ:

The captioned plaintiffs appear herewith represented by the attorney that subscribes and respectfully formulate the following Motion for Reconsideration of the judgment handed down on 28 July, 1978, which was filed in the court records with the date of 31 July, 1978; in view of the following errors:

1. The Honorable Court erred in not taking into consideration the brief of the plaintiffs of 15 June, 1977, "Motion in Opposition to Dismissal on the part of the defendant South Puerto Rico Sugar Corporation".

The opposition of the plaintiffs of 15 June, 1977, to the Motion for Dismissal presented by the defendant South Puerto Rico Sugar Corporation, has the particularity that it was accompained by a sworn statement, which was never contested, that two of the plaintiffs were not summoned. The presumption of the regularity of serving such summons remains in dispute, a controversy that in fact cannot be elucidated in a Motion for Dismissal or a summary judgment.

Moreover, for the purpose of deciding the three motions for dismissal presented by the plaintiffs, this Honorable Court was obliged to consider as certain all which was informed in said sworn statement, because its decision is equivalent to a summary judgment: *Corporación Azucarera* v. *Tribunal Superior*, 104DPR 214 (1975).

2. The Honorable Court committed an error on deciding that Ely Rosalyn Rodríguez Muñiz, had been served a summons.

We repeat that there is in the court records a sworn statement of 15 June, 1977, which establishes that Ely Rosalyn Rodríguez Muñiz, was not in Yauco, Puerto Rico on 16 June, 1964, the date which appeared as having served her with a summons.

This is a situation of facts that can only be settled in a plenary suit giving opportunity to the party of the plaintiff to present evidence to the fact and on the day of the discussion of the Motion for Dismissal it did not exist in the records nor has the party of the defendant offered evidence to the contrary.

The Court has to offer the plaintiffs their day in Court to present all evidence in support of their claim.

3. The Honorable Court committed an error on deciding that the minor Betsy Maritza Rodríguez Muñiz, was represented.

It arised from the records that all the proceedings in the Yauco lower Court, were by default. Nor the mother, nor any of the plaintiffs here appeared in the process. The case of *Agostini* v. *Registrador*, 39 DPR 577 is distinguishable. In *Agostini*, the father appeared in the process. In our case no such appearance existed and we repeat, it was heard by default.

Under Rule 45.2 (f) of the Civil Procedure of 1958, it is required that the legal counsel or tutor should have appeared in the process, in order to be able to validly hand down a judgment by default. The Court in the case of the nonappearance of the mother, should have requested the Superior Court to have appointed a legal counsel to represent the minor, *Fernández Martínez* v. *Superior Court* 89 DPR 754.

To uphold the judgment that is being challenged by means of this procedure would be to permit the deprivation of the property of a minor without due process of law violating the local and federal constitutions.

According to the Supreme Court of Puerto Rico, in the case of *Fernández Martínez* v. *Superior Court* previously cited, the appearance of the legal counsel is required and it cites Moore in the following manner:

"Only the court can hand down a judgment by default against a minor or one incapacitated and only when this one is represented in the lawsuit by a general tutor, custodial council, or any other representative that has appeared in the process. If the minor or the one incapacitated who is a defendant is not represented by a general tutor that has appeared in the lawsuit, the court should appoint a legal counsel who should deny all the essential facts placing the plaintiff in a position of having to establish his case. "Moore's Federal Practice, sec. 55.05 (4) pag. 1817.

Thus under the curren procedure at present, and contrary to what was expressed by this Honorable Magistrate

on page seven, the Court could not hand down a judgment without the appearance of the representative of the minor or one incapacitated.

FOR ALL OF WHICH it is respectfully requested from that Honorable Court that it cancel the judgment handed down on 28 July, 1978 notified on 31 July and as a consequence to dismiss the motions for dismissal presented by the defendants.

I CERTIFY: That I have sent an exact and faithful copy of this brief today, to Attorney Carlos García Méndez, Box 193 Mayaguez, Puerto Rico 00708 and Attorney Rafael Toro Cubergé Box 66 Yauco, P.R. 00768 by certified mail.

At Ponce, Puerto Rico, on 15 August, 1978.

Respectfully,

(signed)

JUAN LUIS BOSCIOMONLLOR
P.O. Box 708
Ponce, P.R. 00731

(SEAL AFFIXED)

DISTRICT COURT OF PUERTO RICO
YAUCO COURT

Civil CS-64-51

THE UNITED STATES OF AMERICA)
The President of the U.S.A.)SS

SOUTH PUERTO RICO SUGAR CORP.

Plaintiff

v.

JOSEFA MUÑIZ; and the succession of ARMANDO RODRIGUEZ RODRIGUEZ composed of his widow the previously named Josefa Muñiz, and his children Aurea Esther, José Ramón and Epifania of the surnames Rodríquez Rivera, Armando Rodríguez Semidey and Eli Rosalyn and Betsy Maritza Rodríguez Muñiz,

Defendants

Action Concerning Real Estate Foreclosure Proceedings

NOTICE OF AUCTION

The People of Puerto Rico, to:

All the defendants in subject case; to the Federal Land Bank of Baltimore which has a mortgage right registered prior to the executed mortgage in this case; to F. Carrera y Hermanos, to Primitivo Grau & Sons, to the Successors of Esmoris & Co., to the Insular Chamber of Merchants & Wholesalers, and to Luri Torrefaction Inc., all of which have registered liens in the Registry prior to the mortgage which is being executed; and TO THE GENERAL PUBLIC:

I, Teobaldo González, Marshal of the District Court of Puerto Rico, Yauco Court, MAKE IT KNOWN:

That carrying out the writ which has been issued to me by the Secretary of the Court in case, and in order to

satisfy the plaintiff SOUTH PUERTO RICO SUGAR CORPORATION, with the amount of the judgment pronounced in his favor in the amount of $670.25 the interests on said amount at 6% yearly from the day of 20 April, 1964 and until the final payment, plus the amount of $2,700.00 for court costs and lawyer's fees which were guaranteed by a mortgage, I WILL SELL AT PUBLIC AUCTION, for cash and to the best bidder, at ten o'clock in the morning on the day of 18 January, 1965, and at my office located at the premises of this Court, on Vivaldi Pacheco Street, Yauco, P.R. all rights title or interest that the defendants named in this case have and could have and have had in the following real estate which is described in the complaint and which was mortgaged in guarantee of the indicated amounts and of others:

A. RURAL: Part in Vegas Ward of the municipality of Yauco, of 113.723 "cuerdas", containing a lumber and zinc house, I say, without structures, bordering to the NORTH, Juan José Vélez, Valentina Alvarez, Meregildo Ruiz, and Juan Ramón Rodríguez to the WEST, P.R. Water Resources Authority, to the SOUTH, the same Water Resources Authority, to the EAST, the same Authority and Domingo Carballo and Juan Ramón Rodríguez. From this property it is said that a plot of 0.177 "cuerdas" was segregated

B. RURAL: Part in Vega and Naranjo wards of Yauco, of 47.25 "cuerdas" but that upon being measured it turned out to be of 52.53 "cuerdas", containing various structures and bordering to the NORTH, Narciso Rodríguez, Gaspar Rosa separated by the road, M. Vélez, and a stream- separating Domingo Vivaldi Pacheco; SOUTH, Francisco Correa, Monserrate Ruiz, a one "cuerda" segregated plot, Juan Nieves Rodríguez which today belong to Domingo Vivaldi, the succession of Pedro García, succession of Aquilino Torres, and Hermenegildo Ruiz; EAST and WEST, Domingo Vivaldi Pacheco, and Sergio Prado.

C. RURAL: Part in Vegas and Naranjo Wards of Yauco, of 26.91 "cuerdas" bordering to the NORTH, Domingo Vivaldi Pacheco, succession of Julia Vélez, Monserrate Ruiz, and others of Domingo Vivaldi Pacheco; SOUTH, Bernabé Cruz, Antonio Cuevas and Las Piñas road, and lands of Narciso Rodríguez; EAST, Las Piñas road and lands of Monserrate Ruiz, Domingo Vivaldi, and the succession of Julia Vélez, WEST, Narciso Rodríguez, Las Piñas road. Contains a wood and zinc house.

D. RURAL: Part in Naranjo Ward of Yauco, of 13.00 "cuerdas", bordering to the NORTH, Dolores Morales wife of Juan Torres; WEST Succession of Simón Pacheco, SOUTH, the Naranjo stream, and EAST, Ramón Ruiz. Contains a wood and palm thatched house.

It is made known that according to what is stated in the complaint, from the mortgage that is executed there is pending the payment of three capital installments of $2,250.00 each one, with additional interests, due on 30 June of the years 1964, 1965 and 1966, which were not the object of collection in said complaint since they were not due on the date that the complaint was filed.

And for its publication in the newspaper EL DIA, which is published in Ponce, P.R., during the limit of the law, I issue this notice in Yauco, P.R., today, 10 December, 1964.

(signed)
Teobaldo González
Marshal District Court Yauco
Court

(SEAL AFFIXED)

SWORN STATEMENT

I, TOMAS COLLADO GOMEZ, of age, married, retired employee and a resident of Yauco, Puerto Rico, under oath I hereby declare and state:

That I am of the personal circumstances previously indicated and that my name is as stated.

That around the years 1964 and 1965 I held the position of Assistant Marshal of the District Court of Yauco, Puerto Rico and in the carrying out of my stated duties and specifically in regard to civil case no. CD 64-51 of said Court, I served a summons to and personally notified, in Yauco, P. R. with a copy of the complaint and the summons of said case, Eli Rosalyn Rodríguez, having effected said summoning and having delivered said documents personally to the mentioned Eli Rosalyn Rodríguez, on the day of 19 June, 1964.

That on two previous occasions in May, 1964, and on 5 June, 1964, I tried to summon in the mentioned case the named Eli Rosalyn Rodríguez in Yauco, P. R., not having been able to locate her on said dates, having located her subsequently in the date previously indicated of 19 June, 1964.

That on the same day of 19 June, 1964, I cancelled in the original document for serving the summongs in the aforementioned case, three internal revenue stamps, two of fifty cents (50¢) and one of twenty-five cents (25¢), having it made evident on said stamps the date of 6/19/64 which was when I served the summons to Mrs. Eli Rosaly Rodríguez.

That likewise in the Registry Book of Notifications that is kept at the offices of the Marshal of the District Court of Yauco, I left evidence in said book of the date that I served the summons to Mrs. Eli Rosalyn Rodríguez and

the previous date when I summoned all the other defendants in the case CD 64-51, with the exception of Mrs. Aurea Esther Rodríguez Rivera, who was in the United States, and was served a summons in the City of New York.

That regarding the summoning of the mentioned Eli Rosalyn Rodríguez and of the other defendants in the mentioned case, I notified Attorney Carlos Garcia Méndez by means of written communications which bear the dates of 27 May, 1964, and 5 and 23 June, 1964.

That everything previously declared is truth regarding all that is related to the summoning and the notification of the mentioned documents, which I hereby declare under the most solemn oath.

Yauco, Puerto Rico, on 30 June, 1977.

(Signed)
TOMAS COLLADO GOMEZ

Affidavit No. 9,052

The present declaration sworn and subscribed before me, by Mr. Tomás Collado Gomez, of age, married, owner and resident of Yauco, Puerto Rico, who I attest to know personally in Yauco, Puerto Rico, today 30 June, 1977.

(signed)-signature illegible
NOTARY PUBLIC

(SEAL- Rafael Baragaño
Amadeo
Notary PUERTO RICO)